IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956

No. 475

LLOYD MOREY, Auditor of Public Accounts of the State of Illinois, LATHAM CASTLE, Attorney General of the State of Illinois, and JOHN GUTKNECHT, State's Attorney of Cook County, Illinois,

Appellants,

vs.

GEORGE W. DOUD, DONALD Q. McDONALD, and J. WESLEY CARLSON, doing business as BONDIFIED SYSTEMS, and EUGENE DERRICK,

Appellees.

Appeal from United States District Court for the Northern District of Illinois, Eastern Division

MOTION TO AFFIRM

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The Scheffer Press, Inc.—ANdover 3-6850

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Appellees move that the decree of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

On the previous appeal (October term 1955, No. 12, 350 U. S. 485) this Court had before it the complete record of the trial and the constitutionality of the Act was fully briefed and argued. At that time counsel for the respective parties joined in expressing the hope that the Court's opinion on the question then presented might cover also the constitutional question, although it was recognized that this was not necessary to a decision of the question as to jurisdiction. The District Court, conceiving that it had no jurisdiction, had then entered no decree respecting the validity of the Act which this Court could either affirm or reverse. Thereafter, pursuant to the direction of this Court, the District Court proceeded to exercise its jurisdiction and on the same record entered the injunctional decree which is challenged by this appeal.

There is no warrant or basis in the findings of fact or anywhere else in the record for the characterization of appellees' financial operations as "dubious", nor for the statement that plaintiffs are insolvent and afford the public little protection. The District Court found that plaintiffs "operate their business in substantially the same manner as that of the American Express Company" (jurisdictional statement p. 19); that the plaintiffs "have adopted a number of precautionary measures to insure protection of their customers" (p. 22), and that "while the plaintiffs have only begun their business, other Bonded licensees have operated for ten years or more and have conducted a substantial, and so far as this record shows, a responsible business", and "in the first year of operation the plaintiffs sold over $1,400,000 of money orders in northern Indiana alone" (jurisdictional state-

ment, p. 23). The maximum amount for which any one money order is issued either by plaintiffs (R. 224) or American Express Company (R. 359) is $100, and the average charge for the service is about fifteen cents (R. 355). The operating bank account of the Bondified Systems partnership composed of three of the plaintiffs contained $9,000 when the suit was filed (R. 244). In a special account for the payment of money orders the partnership maintained an average daily balance of more than $16,000. (R. 232-243).

ARGUMENT

I. There is no showing or contention that the specific findings of fact made by the District Court were clearly erroneous and Rule 52(a) of the Rules of Civil Procedure applies. *U. S. v. U. S. Gypsum Co.*, 333 U. S. 364, 394; *Gracey Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U. S. 271, 274, 275; *U. S. v. Yellow Cab Co.*, 338 U. S. 338.

In its application to the specific facts found by the District Court (findings 3, 4, 8 and 9) the Act deprives the plaintiffs of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution in its complete exemption, irrespective of the financial or other qualifications of one class of persons, firms and corporations, namely, those who sell in retail stores the money orders of whomsoever may be doing business under the name American Express Company, coupled with the absolute prohibition of the sale in such places of other money orders by another class of persons, firms and corporations, including the plaintiffs; namely, those not named in the exemption irrespective of *their* financial or other qualifications. The right to conduct a lawful business is a property right. All persons similarly circumstanced must be treated alike and immunity granted to a class, however limited, having the effect to deprive another class of a personal or property right is a denial of the equal protection of the laws to the latter class. *Truax v. Corrigan*, 257 U. S. 312; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 559; *Roaster Guano Co. v. Virginia*, 253 U. S. 412; *Southern Ry. Co. v. Greene*, 216 U. S. 400; *Seaboard Dry Goods Co. v. Louis*, 294 U. S. 550.

2. At page 4 of the jurisdictional statement the question is posed "Should the District Court have held that the Illinois courts had never passed upon the specific legal questions presented herein and therefore have not held appellees to those courts?" On the next page it is said that there is presented a "direct and diametrical conflict of the utterances of the Supreme Court of Illinois and of a triumvirate Federal District Court upon the question of the constitutionality of the statute." In arguing the point on page 13 of the jurisdictional statement reliance is placed upon the previous decision of the District Court reversed by this Court) that a "prerequisite to the exercise of federal equity jurisdiction is a State Supreme Court decision as to the validity of the Act as applied to the plaintiffs. Federal courts withhold the exercise of jurisdiction only when there is a lack of clarity as to the meaning or application of a state statute." It is not contended that the challenged statute is ambiguous or that it may not apply to plaintiffs as to whom the defendants admittedly threaten to enforce it, and there is no question as to its meaning or application.

3. As pointed out in the opinion of the District Court (jurisdictional statement page 23), the Supreme Court of Illinois said: "The General Assembly would surely never have passed the Act if they had thought the said companies [*i. e.*, American Express, Postal Telegraph and Western Union] would be made subject to its rules and regulations." It could hardly be more clearly said that the exemption provision is not severable, and this would seem to be conclusive. If it were not, since the case comes from a Federal court the question of severability could be determined by the Court in the absence of a decision by the

state court (*Guinn v. U. S.*, 238 U. S. 347, 366; *Dorchy v. Kansas*, 264 U. S. 286; *Myers v. Anderson*, 238 U. S. 368, 381; *cf. Skinner v. Oklahoma*, 316 U. S. 535, 543) and that the exemption provision occurs in the definition of "community currency exchange" and could not be severed without changing the meaning of at least 21 sections of the Act which in seventy five instances contain the expression "community currency exchange" or "currency exchange" meaning "community currency exchange" as so defined.

4. The District Court gave several answers to the contention that plaintiffs did not come into court with clean hands because their money orders bore the word "Licensed" (jurisdictional statement pp. 19 and 20): (1) it had no relation to the constitutionality of the Act; (2) it was not shown that any one was deceived; (3) plaintiffs intended the expression to mean that they were licensed by the copyright holder, which was the fact.

The meaning of ambiguous expressions in ordinances and state statutes is to be determined by state courts, but the cases cited by appellants do not hold, and this Court has never held, that whether or not the plaintiffs in a particular case have come into the Federal Court with clean hands must be determined by some other court.

5. The District Court's finding of fact No. 10 (jurisdictional statement p. 26) is as follows: "The defendants concede that plaintiffs will be required to qualify under the Act and that they will enforce it against the plaintiffs when the latter violate it, which admittedly they are doing now. The defendant officials were not apprised of a violation until shortly before plaintiffs filed their com-

plaint. To operate as a currency exchange without first securing a license subjects the plaintiffs to a criminal prosecution and the penalty of a heavy fine or imprisonment, or both. In the meantime the plaintiffs, presumably to avoid further possible penalties, are withholding establishment of additional agencies and losing the opportunity to conduct and expand their business. The plaintiffs have demonstrated the imminence of irreparable injury."

The fact that prosecuting officers of the state have threatened to enforce against the plaintiffs an unconstitutional state law prohibiting them from carrying on their business and if not enjoined will prosecute the plaintiffs, shows the imminence of irreparable injury justifying the exercise of federal equity jurisdiction, since withdrawal from further business until a test case is taken through the state courts, and perhaps to this Court, would result in a substantial loss of business for which no compensation can be obtained. *Toomer v. Witsell*, 334 U. S. 385, 392; *Cline v. Frink Dairy Co.*, 274 U. S. 445, 452; *Hi Grade Provision Co. v. Sherman, et al.*, 266 U. S. 497, 500; *Kennington v. Palmer*, 255 U. S. 100; *Gibbs v. Buck*, 307 U. S. 66, 77, 78.

In *Rast v. Van Deman*, 240 U. S. 342, cited in the jurisdictional statement, this Court said at page 355:

> "It was determined that the bill set forth grounds for equitable relief; that the condition of complainants' businesses and of the property engaged in them was such that the statute, if exerted against complainants and their property, would produce irreparable injury. *Ex parte Young*, 209 U. S. 123; *Robbins v. Los Angeles*, 195 U. S. 223; *Davis & Farnum Mfg. Co. v. Louisiana*, 189 U. S. 207. We concur in this view."

Appellants state that "any moneys paid the auditor under the statute could later have been recovered if paid under protest and the statute were held unconstitutional." Appellants overlook the fact that the statute absolutely prohibits the plaintiffs from selling money orders in retail stores, which is the only business in which they are engaged. The irreparable injury is in the loss the plaintiffs sustain in not being able to conduct their legitimate business.

CONCLUSION

The opinion of the three judge court, and its findings of fact so clearly justify the challenged decree under the authority of decisions of this Court that no substantial question remains, requiring plenary consideration on briefs and oral argument, especially in view of the fact that the court has previously had before it the entire record of the trial and briefs and oral arguments on every question presented in this statement as to jurisdiction.

The motion to affirm should be granted.

Respectfully submitted,

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